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Nos. 92-515 and 92-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN, *Petitioner,*
v.
TODD MITCHELL, *Respondent.*

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

STATE OF OHIO, *Petitioner,*
v.
DAVID WYANT, *Respondent.*

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

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INTEREST OF THE AMICI CURIAE

The Amici States, through their attorneys general, respectfully submit this brief in support of the petitioners in two cases, *Wisconsin v. Mitchell*, No. 92-515, and *Ohio v. Wyant*, No. 92-568, urging this Court to grant the petitions for writ of certiorari and reverse the decisions of the Wisconsin Supreme Court and Ohio Supreme Court. This case provides the Court with the opportunity to review the constitutionality of hate crime statutes significantly different from the one struck down in *R.A.V. v. City of St. Paul*, 505 U.S. ____, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), namely, the various forms of "penalty enhancement" statutes that authorize sentencing judges to impose more severe sentences on criminals whose crimes were motivated by discriminatory intent.

Amici States have a substantial interest in combatting the pernicious effect of hate crime on its victims and society as a whole. Consequently, the Amici States, among others, have passed hate crime statutes in response to such a problem. Some of the statutes are substantially similar to the Wisconsin and Ohio laws that were struck down by their state supreme courts. An example is an Illinois statute that provides in relevant part:

> Factors in Aggravation. (a) The following factors shall be accorded weight in favor of imposing a term of imprisonment or may be considered by the court as reasons to impose a more severe sentence under Section 5-8-1:
>
> * * *
>
> (10) the defendant committed the offense against a person or a person's property because of such person's race, color, creed, religion, ancestry, gender,

> sexual orientation, physical or mental disability, or national origin. . . .

Ill. Rev. Stat. ch. 38, ¶ 1005-5-3.2 (1991).[1]

Amici States believe that not only are penalty enhancement, and indeed all, hate crime laws vulnerable to challenge based on the faulty analysis employed by the courts below, but that their civil discrimination laws may also be vulnerable. These laws contain operative language found in the hate crime statutes struck down by the courts below. Amici States have a strong interest in the continued validity of antidiscrimination statutes that form the very foundation of civil rights laws in their states. This Court is urged to grant the petitions for writ of certiorari to explore fully the First Amendment implications of penalty enhancement statutes and to consider the impact of recent rulings on the many state and federal antidiscrimination laws that target conduct based on specified motivation.

SUMMARY OF ARGUMENT

Recent news coverage has revealed the serious and growing national problem of hate crime. States have a substantial interest in fighting the pernicious effect hate crime has on its victims and society as a whole. Amici States submit that they may constitutionally fight this problem as an exercise of their traditional police powers. Some states

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[1] Illinois has also enacted a substantive hate crime statute, under which the commission of certain crimes "by reason of" the race, color, creed, religion and other specified characteristics of the victim is subject to penalties (Ill. Rev. Stat. ch. 38, ¶ 12-7.1 (1991)). Further examples of statutes allowing a defendant's bias motive to be considered as a factor in sentencing include N.J. Stat. Ann. § 2C:44-3; N.H. Rev. Stat. Ann. § 651:6I(g).

have responded to the stubborn problem of hate crimes by passing statutes that enhance the penalty for certain predicate offenses committed "because of" or "by reason of" the victim's race, religion, or other protected class. Two of these statutes, Wis. Stat. § 939.645 and Ohio Rev. Code § 2927.12, have recently been struck down by their respective state supreme courts. Those courts relied for their holdings on a faulty analysis of *R.A.V.* and other federal decisions that discuss the reach of the First Amendment.

Many states have penalty enhancement hate crime statutes substantially similar to the statutes struck down. These statutes would be vulnerable to challenge under the analyses employed by the courts below. Furthermore, most if not all states have civil antidiscrimination laws that contain operative language the same as or similar to the operative language in the hate crime statutes struck down; thus, these laws are also vulnerable under the reasoning of the courts below. Because the holdings of those courts will have such far-reaching impact on First Amendment jurisprudence at the state court level, this Court should rectify the lower courts' analyses and uphold the constitutional validity of penalty enhancement hate crime statutes and state antidiscrimination laws.

Finally, other state courts have upheld or are currently reviewing similar hate crime statutes against First Amendment challenges. Granting the petitions for writ of certiorari, therefore, will give this Court an opportunity to resolve a conflict among state courts as to the appropriate reach of the First Amendment to penalty enhancement hate crime statutes.

ARGUMENT IN SUPPORT OF CERTIORARI

I.

THE SERIOUS AND GROWING PROBLEM OF HATE CRIME REQUIRES AN APPROPRIATE STATE LEGISLATIVE RESPONSE.

On January 6, 1992, in New York City, it was reported that a 14-year old black male and his 12-year old sister were jumped by four white teenagers who beat them, robbed them of $3.00, shaved off the girl's hair, and sprayed them with white shoe polish while shouting, "You'll be white today!" Glave, *Hate Crime Against Children Sparks Concern In A Hard Town*, The Associated Press, January 10, 1992, Domestic News Section (*"Hate Crime Concern"*). Over the last three years, the number of hate crimes reported to the Chicago police, like the one described above, has been steadily rising. Reardon, *Hate Crimes Touch Raw Nerve In City*, Chicago Tribune, July 8, 1992, at p. 1. Unfortunately, the Chicago experience is not unique; the incidence of hate crimes is up all across the nation,[2] along with a broadening of the perpetrators and targets of hate. Welch, *Tensions Between Clashing Cultures Lead to More Hate Crimes*, The Associated Press, September 9, 1991, Washington Dateline Section. One aspect of this trend as a national phenomenon is well documented by the Anti-Defamation League of B'nai B'rith: the number of anti-

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[2] For example, hate crimes increased 18 percent in 1991 in New Jersey, which was the fourth year in a row of an increase in reports of hate crimes. Gray, *Bias Crime Rate Up 18%, And Juveniles Led The Surge*, New York Times, April 4, 1992, § 1 at 29. In Los Angeles County, hate crimes reached record levels in 1991 for the seventh consecutive year, an increase of 22% over 1990. Chavez, *Hate Crimes Set A Record in L.A. County*, Los Angeles Times, March 20, 1992, § A at 1 (*"L.A. Hate Crimes"*).

Semitic incidents committed across the nation during 1990 was the highest total ever reported in the 12-year history of the ADL's study of the problem. *Hate Crimes Statutes: 1991 Status Report*, Anti-Defamation League of B'nai B'rith (1991) at p. 1 ("ADL Status Report"). "Everyone who collects data reports a steady increase in hate crimes in the last year or two." Goleman, *As Bias Crimes Seem to Rise, Scientists Study Roots of Racism*, New York Times, May 29, 1990, § C at 1 ("*Roots of Racism*").[3]

In addition to the unsettling trend toward a higher incidence of hate crimes, the violent nature of the crimes and the effects on the victims and society at large are particularly disturbing. Scientists have found that hate crimes are often vicious; for example, hate crime assaults are "far more lethal than other kinds of attacks, resulting in hospitalization of their victims four times more often than is true for other assaults." *Roots of Racism, supra.* Furthermore, the level of violence is increasing. *L.A. Hate Crimes, supra.* Nevertheless, hate crimes often "wound the psyche more than the body and leave a residue of painful distrust and fitful dreams." Kleinfield, *Bias Crimes Hold Steady, But Leave Many Scars*, New York Times, January 27, 1992, § A at 1. Moreover, all members of a victim's group are affected by a hate crime, and some act

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[3] *See also*, Note, *Combatting Racial Violence: A Legislative Proposal*, 101 Harv. L. Rev. 1270, 1270 (1988) (Article cited sources that found "an alarming trend of increased racial violence against minorities in the United States, dramatizing the intense racial hatred and prejudice that still plague this country"). Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 Yale L.J. 845, 846 (1990); Comment, *Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies*, 75 J. Crim. L. & Criminology 103, 103 (1984).

out their anger by responding with counterattacks. *Hate Crime Sparks Concern, supra.* Because a hate crime may escalate into mob violence, these crimes have potential impacts on the community that differ from those resulting from similar acts committed without a bias motive. As the American Bar Association Section of Criminal Justice reported:

> [M]any criminal justice personnel and community leaders believe that crimes motivated by bias have a far more pervasive impact than comparable crimes that do not involve prejudice *because they are intended to intimidate an entire group.* The fear they generate can therefore victimize a whole class of people. Furthermore, our country is founded on principles of equality, freedom of association, and individual liberty; as such, bias crime tears at the very fabric of society.

Finn, *Bias Crime: Difficult to Define, Difficult to Prosecute*, Criminal Justice, Summer 1988, at 19, 20 (emphasis in original).

Clearly, states have a substantial interest in fighting the devastating effect that hate crime has on its victims and society as a whole, as outlined above.[4] Furthermore, combatting hate crime is obviously within the constitutional power of the states as exercises of their traditional police powers to protect the health, safety and welfare of their citizens. State laws that enhance the penalties for hate crime are a rational way to apply that police power. These laws are not directed at the expression of ideas, but are meant to regulate conduct of a particularly malicious type.

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[4] The federal government, as well as the states, has recognized the need to address by statute the problem of bias-motivated crime; it has already addressed the consummate hate crime, genocide, 18 U.S.C. § 1091 *et seq.*, and has proposed H.R. 4797, "The Hate Crimes Sentencing Enhancement Act of 1992."

Amici States submit that hate crime is conduct and does not implicate free expression at all. Any expressive element that may be involved in the conduct is merely "swept up incidentally within the reach of [the] statute." *R.A.V.*, 505 U.S. at ____, 112 S. Ct. at 2546, 120 L. Ed. 2d at 321. Moreover, the legislative response of enacting penalty enhancement statutes is no greater than necessary to achieve the governmental interest of fighting this especially pernicious class of crimes. By treating bias-motivated crime as something more egregious than the predicate offense, states send an important message to the perpetrators of hate crimes that the increased harm to victims and society from their conduct will be punished accordingly. Thus, the imposition of a greater penalty for hate crime is not merely rationally related to the purpose of combatting such crime, it is closely tailored to the greater societal harm created by hate crime.

II.

THIS COURT SHOULD GRANT THE PETITIONS FOR WRIT OF CERTIORARI TO REVIEW THE SPECIFIC PROVISIONS OF THE WISCONSIN AND OHIO STATUTES IN ORDER TO CLARIFY THE CONSTITUTIONALITY OF STATE STATUTES WITH THE SAME OR SIMILAR LANGUAGE.

In their efforts to combat bias-motivated crime, states have adopted a variety of measures.[5] One approach was recently struck down by this Court as a regulation of speech in violation of the First Amendment of the United States Constitution. *R.A.V.*, *supra*. Another approach, substantially different from the one examined in *R.A.V.*,

[5] According to the ADL Status Report, 46 states have some type of hate crime law.

provides enhanced penalties for criminal activity that is motivated by bias. Two statutes of the latter type, Wis. Stat. § 939.645 and Ohio Revised Code § 2927.12, were recently struck down by the supreme courts in their respective states, whose holdings relied on an analysis of *R.A.V.* *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992), and *State v. Wyant*, 64 Ohio St. 3d 566, 597 N.E.2d 450 (1992). Although the constitutional issues presented in reviewing the two statutes are similar, the statutes are worded differently. While Amici States believe both statutes are constitutional, the allowance of both petitions will give the Court an opportunity to discuss fully the permissible range of alternative legislative enactments to combat hate crime.

1. Examining The Difference Between The Wisconsin And Ohio Statutes Will Guide States In Evaluating Their Own Hate Crime Statutes.

Wis. Stat. § 939.645, at the time of the defendant's crimes in *Mitchell*,[6] provided for an increase in the penalty to be exacted for the underlying crime if a person:

> Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

Although the basic thrust of Ohio Rev. Code § 2927.12 is the same, the language differs substantially:

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[6] The May 1992 amended version of the Wisconsin statute is discussed in a footnote of the *Mitchell* opinion. See Appendix to petition for writ of certiorari in *Wisconsin v. Mitchell* at A.12-A.13.

(A) No person shall violate section 2903.21 [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief], or division (A)(3), (4), or (5) of section 2917.21 [telephone harassment] of the Revised Code *by reason of the race, color, religion, or national origin of another person or group of persons.*

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation. (Emphasis added).

The two statutes differ in several respects. The Ohio law enhances the penalty for particular predicate offenses by creating an independent offense of ethnic intimidation, whereas the Wisconsin law enhances the penalty for particular predicate offenses by simply changing the scope of penalty allowable for the predicate offense. Moreover, the Wisconsin statute specifically requires intentional selection, whereas the Ohio statute accomplishes the same goal simply through the use of "by reason of" language. Further, the Ohio statute protects a person who is victimized because of his association with a "group of persons" and is thus broader in the range of people covered than the Wisconsin statute, which is limited to persons chosen as victims only because of their own characteristics. Finally, the Wisconsin statute includes more protected classes of persons and different predicate offenses than the Ohio law. Both statutes are, however, fairly included in the category of penalty enhancers and both are distinguishable from the ordinance struck down in *R.A.V.* Determining that both these legislative responses to the problem of hate crime are constitutional will help states determine that their particular penalty enhancement hate

crime statutes are permissible under the First Amendment.

2. Civil Antidiscrimination Laws May Be Vulnerable Under The Reasoning of *Mitchell* and *Wyant*.

Most, if not all, states have statutes similar to Title VII that prohibit discrimination on account of race, color, religion or other protected classes. *See, e.g.*, Ill. Rev. Stat. ch. 68, ¶¶ 1-101 *et seq.* (1991). These statutes contain language the same as or similar to the "because of" or "by reason of" language found in the hate crimes statutes at issue here, thus similarly leading a fact finder to examine the discriminatory action of the perpetrator. For instance, some antidiscrimination statutes prohibit discrimination in housing "because of race, color, religion, sex, or national origin." Ohio Rev. Code § 4112.02(H).[7] These antidiscrimination statutes are constitutional because:

> [a]s long as it is the underlying discriminatory behavior that is being regulated, the First Amendment is not offended, for under the analysis in [*United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed. 2d 672 (1968)] the penalty exacted on speech in such cases is incidental to the governmental purpose of regulating the purely non-expressive component of the conduct.

Statement of Rodney A. Smolla, Arthur B. Hanson Professor of Law and Director of the Institute of the Bill of Rights Law at the College of William and Mary, before the Subcommittee on Crime and Criminal Justice of the

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[7] Ohio Rev. Code § 4112.02(H)(12) prohibits any person from intimidating another because of the exercise of any right protected or granted by the section. Ohio also has made criminal the same conduct. *See* Ohio Rev. Code § 2927.03. If one applied the reasoning of the *Wyant* decision, the validity of this criminal statute and its civil counterpart obviously would be cast into doubt.

U.S. House of Representatives regarding H.R. 4797,[8] July 29, 1992, at pp. 38-9 (hereinafter referred to as "Smolla Statement").

The constitutionality of penalty enhancement hate crime statutes depends on the same analysis. Thus, if such statutes are struck down because they penalize the harm caused by selecting victims just because of who they are, then antidiscrimination statutes that operate in exactly the same way might similarly be viewed as unconstitutional. The analysis employed by the courts in *Mitchell* and *Wyant* could be used to undermine statutes that form the very foundation of civil rights law in their states. Amici States urge this Court to grant the petitions for certiorari to clarify the continued constitutionality of the many state antidiscrimination laws.

3. The *Mitchell* and *Wyant* Analyses of Federal Case Law Are Flawed.

Not only are the decisions below far reaching, but their analyses of federal case law are fundamentally flawed. Both courts used a simplistic interpretation of *R.A.V.* to support their decision to strike down penalty enhancement hate crime laws. However, as shown above, those laws resemble antidiscrimination statutes which this Court in *R.A.V.* explicitly excluded from its holding:

> since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class

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[8] Bill proposing "The Hate Crimes Sentencing Enhancement Act of 1992," H.R. 4797, 102d Congress, 2d Session (1992).

> of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, ... Where the government does not target conduct on the basis of expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

R.A.V., 505 U.S. at ____, 112 S. Ct. at 2546-47, 120 L. Ed. 2d at 321-22 (citations omitted). Thus, contrary to the courts' analyses in *Mitchell* and *Wyant*, "laws that increase the penalties for bias-motivated crimes in which expressive activity *has nothing to do with the elements of the crime* would not seem to be affected by the *R.A.V.* ruling, and should not run foul of the First Amendment." Smolla Statement at p. 41 (emphasis in original). Granting the petitions for certiorari is particularly warranted where, as here, the highest state courts misconstrue federal precedent to support a decision at odds with that precedent.

Furthermore, Amici States urge this Court to grant the petitions for certiorari to overturn state court decisions in direct conflict with *Dawson v. Delaware*, 503 U.S. ____, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992). In *Dawson*, this Court found that a court's consideration, in the sentencing phase of a trial, of evidence of the defendant's membership in a white power group was improper because that membership did not motivate the crimes committed. *Id.*, 112 S. Ct. at 1098. However, the Court explained that where the motive is causally connected to the crime at issue, the motive may be considered when determining a sentence. *Id.* at 1097. As Professor Smolla explained, the *Dawson* case thus stands for two propositions relevant to the application of the First Amendment to penalty enhancement hate crimes statutes:

> First, the constitutional protection for freedom of expression extends to the penalty phase of the criminal justice process. Second, . . . it would *not* be constitutionally permissible for federal courts to enhance sentences merely on the basis of evidence that a convicted defendant has "abstract beliefs" that are racist, or is a member in a racist organization. Rather, the sentencing court must base its enhancement on evidence that the specific crime for which the defendant was convicted was in fact motivated by the type of prejudice proscribed by [the penalty enhancement hate crime statutes].

Smolla Statement at p. 6 (emphasis in original). Application of the *Dawson* principles then would lead a court to uphold a penalty enhancement hate crime law *if* it can be shown that the predicate offense resulted from a defendant's discriminatory motive. Thus, by striking down penalty enhancement hate crime statutes under the First Amendment and *R.A.V.*, the *Mitchell* and *Wyant* courts neglected to square their holdings with the important principles enunciated in *Dawson*, and their decisions should be overturned.

4. Granting The Petitions Will Resolve A Conflict In State Court Decisions.

In contrast to the courts' holdings in *Mitchell* and *Wyant*, other state courts have upheld similar statutes. Most notably, the Oregon Supreme Court recently upheld Oregon's hate crime law. *State v. Plowman*, 314 Or. 157, ____ P.2d ____, 1992 Ore. LEXIS 158 (August 27, 1992). The court recognized the limited reach of *R.A.V.*, finding that the Oregon hate crime law "is a law directed against conduct, not a law directed against the substance of speech." *Id.*, 1992 Ore. LEXIS 158 at *20-*21. The court also anticipated a conflict among state supreme courts by specifically disagreeing with the reasoning of *Mitchell*. *Id.*, 1992 Ore.

LEXIS 158 at *22. *See also Dobbins v. State*, 17 Fla. Law W. D2222, 1992 Fla. App. LEXIS 10062 (September 24, 1992).

Other state supreme courts are currently reviewing their states' penalty enhancement hate crime laws. *See State v. Stalder*, 599 So.2d 1280, 1992 Fla. LEXIS 1027 at *1 (Fla. 1992) (Florida Supreme Court accepted jurisdiction to "pass[ ] upon a question of great public importance requiring immediate resolution by this Court"); *State v. LaDue*, No. 91-313 (Vermont Sup. Ct., docketing statement filed March 9, 1992). This Court should grant the petitions for writ of certiorari to resolve a conflict among state courts as to the appropriate reach of the First Amendment to this type of statute.

CONCLUSION

Amici States strongly urge this Court to grant the petitions for writ of certiorari and to determine the constitutionality of penalty enhancement hate crime statutes in general and in the context of the distinctions between the Wisconsin and Ohio statutes, to give direction to the many states with similar statutes and to make clear the continued validity of state antidiscrimination laws.

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